No. 17-1717

IN THE
Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

JOHN EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes that the panel opinion departs from a proper understanding of the Establishment Clause.

SUMMARY OF ARGUMENT

Believing that the Constitution should be interpreted strictly according to its plain meaning as understood by its Framers, the Foundation fully endorses the legal and constitutional arguments of the petitioners. Rather than duplicating those arguments, the Foundation will establish that the Establishment Clause does not forbid recognition of the foundational role of Christianity in our history, laws, and culture; that there is an uninterrupted tradition of public display of the cross in America that predates the First Amendment and is therefore sanctioned by *Marsh v. Chambers*, 463 U.S. 783 (1983); that the Fourth Circuit neglected the special

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[1] Pursuant to Rule 37, all parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

significance of the cross for military personnel as reflected in military cemeteries and medals; that the design of the National Mall was consciously based on a Latin cross. that in a similar case currently before this Court on a petition for writ of certiorari, *Pensacola v. Kondrat'yev*, No. 18-351, the District Court and all three judges of the Eleventh Circuit held that the Pensacola cross was prohibited by Eleventh Circuit precedent but strongly urged this Court to review and overturn that precedent.[2] Finally, the Foundation urges the Court to consider that the memory of the fallen commemorated by the Bladensburg cross deserves our utmost respect. The removal of the symbol of their sacrifice would be a sacrilege.

ARGUMENT

I. Under *Marsh v. Chambers*, the public display of the cross is sanctioned by the First Amendment because of an uninterrupted tradition of cross displays that predates the First Amendment.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court upheld the Nebraska Legislature's practice of opening each day with a prayer by a chaplain paid by the State. Noting that legislative chaplains and legislative prayers were a common practice in the American colonies and in the states after independence, that the Continental Congress had

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[2] The City of Pensacola has simultaneously appealed this decision to the full Eleventh Circuit for an *en banc* hearing, and also to this Court on a petition for writ of certiorari, because of this pending case.

prayers, and that Congress itself in 1789 instituted congressional chaplains, the Court held that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress -- their actions reveal their intent." *Id.* at 790. The Court concluded at 792,

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.

Like legislative chaplains and legislative prayer, the public display of crosses and other arguably religious symbols is an unbroken tradition that predates the First Amendment, and nothing in the language or history of the First Amendment evinces any intent to alter or abolish that tradition. We will examine the history of that tradition.

A. The Explorers

During the era of discovery, the planting of a cross was associated with discovery and claims of ownership. As Dr. Hinsdale explained,

> [A] cross reared on an island or coast would be evidence that it had been visited and appropriated by a Christian navigator.... John Cabot raised on the shore of North America crosses

> surmounted by the flag of England and the banner of St. Mark, and Cartier raised crosses crowned with the *fleur de lis* on the shores of the Gulf and River St. Lawrence. St. Lusson stood near a cross at the Saut Ste. Marie when he took possession of the Great Lakes in the name of the redoubtable monarch, Louis XIV of France, as did La Salle when, at the mouth of the Mississippi, he took possession, in the same name, of the vast region that the Mississippi drains.[3]

According to his *Journal*, when Christopher Columbus first landed on what was probably Watling Island October 12, 1492:

> The Admiral took the royal standard, and with the captains went with two banners of the green cross, which the Admiral took in all the ships as a sign, with an F and Y and a crown over each letter, one on either side of the cross and the other on the other. Having landed, they saw trees very green and much water, and fruits of diverse kinds. The Admiral called to the two captains, and to the others who leaped on shore, and to Rodrigo Sanchez of Segovia, and said that they should bear faithful testimony

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[3] B.A. Hinsdale, Ph.D., LL.D, *The Right of Discovery*, Ohio Archaeological and Historical Quarterly, II:2 September 1888, pp. 372-73. A parallel to this may be seen in the practice of planting "summit crosses" at the tops of mountains in Europe.

> that he, in the presence of all, had taken, and now took, possession of the said island for the King and for the Queen.[4]

And further:

> As in all parts, whether islands or mainlands, that he visited, the admiral always left a cross; so, on this occasion he went in a boat to the entrance of these havens and found two very large trees on a point of land, one longer than the other. One being placed over the other, made a cross, and he said that a carpenter could not have made it better. He ordered a very large and high cross to be made out of these timbers.
>
> ....
>
> The Admiral did not leave the port today, for the same reason: a contrary wind. He set up a great cross on the west side of the entrance, on a very picturesque height, "in sign," he says, "that your Highnesses hold this land for your own, but chiefly as a sign of our Lord Jesus Christ."[5]

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[4] *The Journal of Christopher Columbus (During His First Voyage, 1492-93)*, Clements R. Markham, editor (London: 1893), p. 37.

[5] *Id.* p. 106.

When Hernando Cortez landed at Vera Cruz (True Cross) on April 22, 1519, he planted a cross and claimed the territory for Spain. And shortly thereafter, according to Bernal Diaz del Castillo, a soldier who traveled with Cortez and later wrote a five-volume history of the expedition, when two ambassadors from Montezuma visited their encampment:

> [I]t was now the time of the Ave Maria, and at the sound of a bell which we had in the camp we all fell at our knees before a cross placed on a sand hill and said our prayers of the Ave Maria before the cross. When Tendile and Pitalpetoque [Montezuma's ambassadors] saw us thus kneeling, they asked what was the reason that we humbled ourselves before a tree cut in that particular way. As Cortez heard this remark he said to the Padre de la Merced who was present: "It is a good opportunity, father, as we have good materials at hand, to explain through our interpreters matters touching our holy faith." And then he delivered a discourse to the Caciques so fitting to the occasion that no good theologian could have bettered it.[6]

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[6] Bernal Diaz del Castillo, *The True History of the Conquest of New Spain by Bernal Diaz del Castillo, One of Its Conquerors* (London: Hakluyt Society, 1568, 1908) I:40:148-49.

Likewise the Spanish explorer Hernando De Soto erected a cross upon crossing the Mississippi River in 1541:

> They passed the winter of 1541 on the banks of the Yazoo River, in the land of the Chickasaws. In May of that year, they discovered and crossed the Mississippi River, probably not far below Memphis; and there, in the presence of almost twenty thousand Indians, De Soto erected a cross made of a huge pine tree, and around it imposing religious ceremonies were performed.[7]

In 1853 Congress commissioned William Henry Powell to paint *Discovery of the Mississippi by De Soto*. The painting depicts De Soto, his officers and soldiers, and Native Americans, and the raising of a large wooden cross. The painting was placed in the Capitol Rotunda in 1855, where it remains today.[8]

And in the Southwest, as Friar Marcos began his preliminary journey up Sonora Valley in preparation for Coronado's 1540-42 expedition, "Estevan had planted several large crosses along the way, and soon began to send messengers to the friar, urging the latter to hasten, and promising to wait for him at the

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[7] Benson Lossing, *Lossing's New History of the United States, From the Discovery of the American Continent to the Present Time* (New York: Gay Brothers & Co., 1881), p. 45

[8] "Discovery of the Mississippi by De Soto," *Architect of the Capitol, https://www.aoc.gov/art/historic-rotunda-paintings/discovery-mississippi-by-de-soto*

edge of the wilderness which lay between them and the country of Cibola."[9]

As noted above, French and English explorers also planted crosses. Jacques Cartier exploring what is now eastern Canada, "gathered of the Indians some indistinct account of the countries now contained in the north of Vermont and New York. Rejoining his ships, the winter, rendered frightful by the ravages of the scurvy, was passed where they were anchored. At the approach of spring, a cross was solemnly erected upon land, and on it a shield was suspended which bore the arms of France and an inscription, declaring Francis to be the rightful king of these newfound regions."[10]

B. The Colonists

The planting of the cross continued among the early colonists. Jamestown settler and early colonial Virginia Governor George Percy described the first landing at Jamestown,

> The foure and twentieth day [of May] wee set up a Crosse at the head of this River, naming it Kings River, where we proclaimed James King of England to have the most right unto it. When wee had finished and set up our Crosse, we

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[9] George Parker Winship, *The Coronado Expedition, 1540-1542*, Excerpted from the Fourteenth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institution, 1892-93,Part 1, p. 358.

[10] George Bancroft, *History of the United States* (Boston: Little, Brown, and Company, 1853), Vol. I, p. 21.

> shipt our men and made for James Fort.[11]

In 1935 the National Society Daughters of the American Colonists erected a granite cross on Cape Henry in memory of the wooden cross erected by the colonists.[12] In the early days, the Jamestown colony flew the flag of England, a red St. George's Cross on a white background; this was replaced by the Union Jack, which combined the English flag's St. George's Cross with the Scottish flag's diagonal white St. Andrew's Cross on a blue background and the Irish flag's red saltire (diagonal or St. Andrew's cross) on a white background, symbolizing the union of Great Britain.

Shortly after the founding of Jamestown, the French established a colony on Mount Desert Isle (in what is now Hancock County, Maine) in 1613. As Bancroft relates,

> The conversion of the heathen was the motive to the settlement; the natives venerated Biart as a messenger from heaven; and under the summer sky, round a cross in the center of the

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[11] *Narratives of Early Virginia: 1606-1625*, Lyon Gardiner Tyler, editor (New York: Charles Scribner's Sons, 1907), pp. 11, 17-18, "Observations Gathered Out of a Discourse of the Plantation of the Southern Colonie in Virginia by the English, 1606 [1607]. Written by the Honorable Gentleman Master George Percy."

[12] "Cape Henry Memorial Cross," https://www.nps.gov/came/cape-henry-memorial-cross.htm. Dating discrepancies are due to the difference between the Julian and Gregorian calendars.

> hamlet, matins and vespers were regularly chanted. France and [Roman Catholicism] had appropriated the soil of Maine.[13]

In 1634 Leonard Calvert, the first proprietary governor of Maryland, sailed into the Potomac River:

> A cross was planted on an island and the country claimed for Christ and for England. At about forty-seven leagues above the mouth of the river, he found the village of Piscataqua, an Indian settlement nearly opposite Mount Vernon.[14]

The Calvert family used two banners, one with the black and white design of Calvert's father and the other with red and white crosses from his mother's family. Only the former was officially used in colonial days, but in 1904 the State of Maryland adopted a flag that incorporated both designs. Today Maryland's flag features red and white crosses in its lower left and upper right quadrants.[15]

Many of the colonies flew flags with cross designs. The Colony of New Sweden (1638-1655) flew the Swedish Naval Ensign, a gold cross on a blue field. Others flew the Union Jack or variants thereof, which combined the St. George's Cross, the St.

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[13] George Bancroft, *History of the United States* (Boston: Little, Brown, and Company, 1853), Vol. I, pp. 27-28

[14] Bancroft, I:246.

[15] "History of the Maryland Flag, ttps://sos.maryland.gov/Pages/Services/Flag-History.aspx.

Andrew's Cross, and the St. Patrick Saltire. The Russian Naval Ensign, a blue St. Andrew's Cross on a white field, flew over the Russian Ft. Ross in California 1812-1841. Crosses were less common in colonial New England because the Puritans associated the cross with graven images, but the New England Ensign in use 1693-1711 had a red cross on a white field in the upper left corner. When Governor Edmund Andros temporarily united Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New Haven, and New York into the Dominion of New England in 1687, he adopted a flag with a burgundy cross on a white background and a crown in the center.[16]

In colonial times, before churches were established, a cross was often erected to mark a spot where people could gather for worship or for other purposes. If a church was built later, the cross often remained, in or near the churchyard or the cemetery.[17] An outside cross was a regular feature of

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[16] "Historical Flags of Our Ancestors," http://www.loeser.us/flags/colonies.html. At least six states -- Alabama, Florida, Hawai'i, Maryland, Mississippi , and New Mexico -- have a form of cross in their flags today, as do many municipalities.

[17] *The Churchyard Cross*, The Churchman's Family Magazine, June 1863, pp. 587-97. "The universal custom of erecting churchyard crosses, arose, however, not so much out of an imitation of the old Saxon oratory crosses, as out of the general feeling which led the mediaeval Christians to erect crosses in all their public places. .. But not there only was the cross set up. At each entrance to a village or town, in the market-places, at the intersections of cross streets, by the roadsides, even on barren hill tops and in waste moorlands, the cross was erected; so that it was not only when a man went to worship that he was reminded of his faith by its outward sign;

the Spanish missions of the Southwest in the 1700s and 1800s.[18]

C. The Americans of the 1800s

The tradition of crosses in public places continued into the 1800s and beyond.

Around 1671 the French missionary Father Jacques Marquette and the French Canadian explorer Louis Joliet traveled to the Great Lakes region to convert Native Americans to Christianity and to find a river to the Pacific Ocean. Marquette died near Ludington, Michigan on May 18, 1675, and in 1855 a cross was erected on the place where he is believed to have died.[19]

In 1830 the Slovenian "snowshoe priest" Father Frederic Baraga came to northern Minnesota to minister to the Ottawa and Ojibwe tribes. Grateful for safe passage across Lake Superior, Father (later Bishop) Baraga erected a small wooden cross at the mouth of the Cross River, later replaced by a granite

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but he could not travel along the high road, he could not enter a village, he could not buy or sell in the market, without being remind of Him whose standard was thus set up in the land, and whose soldier he had himself been made, when that same sign was marked upon his own forehead." (587-88).

[18] "Serra Cross Park at Grant Park, Ventura, California," http://www.serracrosspark.com/gallery.html

[19] "Father Marquette 1637-1675;" http://geo.msu.edu/extra/geogmich/father_marquette.htm; "Pere Marquette Cross Monument Under Fire as Community Considers Fate," *Muskegon News* January 8, 2018; https://www.mlive.com/news/muskegon/index.ssf/2018/01/pere_marquette_cross_monument.html.

cross and plaque which still stands near Schroeder, MN.[20]

The Foundation invites the Court's attention to Addendum II ("Cross Displays on Public Property") of the Appellants' Opening Brief in the *Pensacola* case in which Appellants identify public crosses by name, date of placement, location, and photographs. These include:

1700s

* The San Buenaventura Mission Cross at Grant Park, Ventura, CA (1782, replaced in 1860s and 1912, transferred to private ownership 2003);

1800s

* The cross in Cross Mountain Park, Fredericksburg, TX (1849, replaced 1946); the Chapel of the Centurion at Fort Monroe, Hampton, VA (1858, transferred to private ownership 2011);

* The Confederate Soldiers Monument, Cross Creek Cemetery, Fayetteville, ND (1868);

* The Monument to Company D, 30th Ohio Volunteer Regiment, Monument Square Park, New Lexington, OH (1876);

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[20] "Father Baragas Cross," https://www.chateauleveaux.com/area-info-father-baragas-cross.htm. The author of this brief visited the Baragas Cross March 27, 2015. The land on which the cross is located is now owned by a local church but was public domain when Father Baraga erected the cross.

* The Irish Brigade Monument (Celtic cross), Gettysburg National Military Park, Gettysburg, PA (1888);

*The Jeannette Arctic Expedition Memorial, United States Naval Academy Cemetery, Annapolis, MD (1890);

* The Horse Fountain Cross, Lancaster, PA (1898);

1900s

* The Father Serra Celtic Cross, Monterey, CA (1908);

* The French Cross, Cypress Hills National Cemetery, Brooklyn, NY (after 1918);

* The Wayside Cross, New Canaan, CT (1923);

* The Father Millet Cross, Old Fort Niagra State Park, NY (1926);

* The War Memorial, Cross of Gray (Town Hall, Weymouth, MA (1929);

*The Rustic Cross, Median on Greene Street, Augusta, GA (1929);

* The Canby's Cross, Lava Beds National Monument, Tulelake, CA (before 1933);

* The Celtic Cross Monument to Oglethorpe, Queen Square, Brunswick, GA (1933);

* The Kauhako Crater Cross, Kalaupapa National Historic Park, HI (1947);

* The Cape La Croix Cross, Cape Girardeau, MO (1947);

* The Garden of Gethsemane Crucifix, Felix Lucero Park, Tucson, AZ (1948);

* The Father Padilla's Cross, along U.S. 56 west of Lyons, KS (1950);

* The Cannon County War Memorial, Main St., Woodbury, TN (1950);

* The Portola Crespi Cross, Carmel Beach State Park, Monterey, CA (1953, blew down and re-erected 1983);

* The Camp Pendleton Cross, Camp Pendleton, San Diego, CA (c. 1957);

* The Pensacola Beach Cross, Pensacola Beach, FL (c. 1959);

* The Seaman's / Aransas Pass Memorial Tower with crucifix, Conn Brown Harbor Park, Aransas Pass, TX (1970);

* The Pioneer Family with Cross, Victoria, KS (1976);

* The Cross of the Martyrs, Hillside Park, Santa Fe, NM (1977);

* The Irish Monument (Celtic cross), Emmet Park, Savannah, GA (dedicated 1984);

* The Irish Cross (Jordan Park International Peace Gardens, Salt Lake City, UT (before 1994);

2000s

* The Confederate Soldiers Monument (Celtic cross), Middletown, NC (2001);

* The Woodbridge Avenue Memorial, Ansonia, CT (updated with cross 2002);

* The Las Cruces City Symbol (three crosses with a sun), City Hall, Las Cruces, NM (2003);

* The Veterans Memorial Plaza (soldier saluting beside cross), David Webb Riverfront Park, Harriman, TN (2006);

* The Jefferson County Veterans Memorial, Courthouse lawn, Mount Vernon, IL (2011).[21]

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[21] Cited and fully documented in Brief of Appellants, Addendum II, pp. 1-38, *Kondrat'yev v. City of Pensacola*, No. 17-13025. The fact that several of these crosses have recently been transferred from public to private ownership because of pressure from misguided separationists, in no way changes the fact that those crosses were erected as part of an unbroken tradition of the public display of the cross.

These are undoubtedly only a small fraction of the crosses erected in public places throughout this nation and throughout its history, but they established an unbroken tradition. In his concurring opinion in the *Pensacola* case, Judge Newsom mentions some of the crosses cited in Appellants' Brief above, and also adds:

> Though not (exactly) first in time chronologically, an interesting place to begin what is necessarily an abbreviated historical survey is with the "Father Millet Cross," which currently stands in Fort Niagara State Park in upstate New York. The current cross was erected in the 1920s on what was originally federal land. Notably, though, it was put there to replace a wooden cross that had been placed in the same spot by a Jesuit priest - Father Pierre Millet -- in 1688, when the territory was under French control. Father Millet was part of a rescue party that had managed to save the remnant of a frontier detachment ravaged by cold, disease, and starvation. On April 16, 1688 -- Good Friday -- Father Millet celebrated Mass, and built a wooden cross, which he dedicated to God's mercy for the survivors.
>
> In 1925, President Calvin Coolidge set aside a 320-square-foot section of Fort Niagara Military Reservation "for the erection of another cross commemorative of the cross erected and

> blessed by Father Millet[]." ...The Father Millet Cross was originally designated as a national monument and administered by the federal government; ownership was transferred to the State of New York in 1949.
>
> To be sure, the Father Millet Cross was originally constructed on land that the United States didn't control (at least definitively) until after the War of 1812. But its history shows that the erection of crosses as memorials is a practice that dates back centuries, and that for a long time now, we -- we Americans, I mean -- have been commemorating the role that religion has played in our history through the placement and maintenance of cross monuments.
>
> In fact, President Coolidge's proclamation was part of a tradition -- in this country specifically -- that stretches back much farther.[22]

And the tradition continues. The Trylon of Freedom Monument outside the E. Barrett

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[22] *Kondrat'yev v. City of Pensacola*, No. 17-13025, pp. 23-24 (Newsom, J., concurring in result). Judge Newsom did not apply a *Marsh v. Chambers* analysis to the *Pensacola* case because he believed the three-judge panel was precluded by *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), from doing so. This Court, of course, is not bound by *Rabun*.

Prettyman United States Courthouse in Washington, D.C., depicts, at the top of the southwest side, religious liberty symbolized by a cross and the Ten Commandments.

Under the *Marsh v. Chambers* analysis, as amplified by *Van Orden v. Perry*, 545 U.S. 677 (2005), and *Greece v. Galloway*, 134 S.Ct. 1811 (2014), the long, uninterrupted tradition of crosses in public places must be considered in determining the meaning of the Establishment Clause. As Judge Kennedy wrote in *Greece*, "[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S.Ct. at 1819 (citations omitted). The public display of crosses was a common practice long before and long after 1789, and nothing in the language or history of the First Amendment indicates any intent to change that practice.

II. The Constitution does not forbid recognition of Christianity's foundational influence upon American history, law, and culture.

Sir William Blackstone (1723-1780), whose *Commentaries on the Laws of England* may have sold more copies in America than in England,[23] recognized that all valid human law must rest upon the Revealed Law, which is "to be found only in the Holy

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[23] Edmund Burke, *Speech on Conciliation with America* (1775), *quoted in* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vermont L. Rev. 5, 5 (1994).

Scriptures,"[24] and on the Law of Nature, which is "expressly declared so to be by God himself"[25] and which is understandable by human reason.

> Upon these two foundations, the law of nature and the law of revelation depend all human laws; that is to say, no human laws should be suffered to contradict these.[26]

Chancellor James Kent's four-volume *Commentaries on American Law* earned him the accolade of "the American Blackstone."[27] Like Blackstone, Kent (speaking of the law of nations) recognized that the law "deriv[ed] much of its force and dignity" from "the sanction of Divine revelation."[28] On behalf of the New York Court of Chancery, Chancellor Kent, upholding a blasphemy conviction, quoted English common-law cases for the proposition that "christianity was parcel of the law, and to cast contumelious reproaches upon it, tended to weaken the foundation of moral obligation, and the efficacy of oaths." Further, "that whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government." *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811).

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[24] Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Robert Bell, 1772) Intro. 2:41-42.

[25] *Id.* Intro. 2:42.

[26] *Id.*

[27] Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377, 380 (2009).

[28] 1 James Kent, *Commentaries on American Law* *2 (Oliver Wendell Holmes, Jr., ed., 1873).

Supreme Court Justice and Harvard Professor Joseph Story (1779-1845), wrote in his influential *Commentaries on the Constitution of the United States* (1833):

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private right of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
>
> ....
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> The real object of the First Amendment was not to countenance, much less to advance, Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[29]

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[29] 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1868, 1871 (1833).

Justice Story understood that Christianity is foundational to a proper understanding of law. As he said at Harvard University in 1829, jurisprudence "searches into and expounds the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation."[30] He said further in that discourse,

> One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks the sanction of its rights, and by which it endeavours to regulate its doctrines. And, notwithstanding the specious objection of one of our distinguished statesmen, the boast is as true as it is beautiful. There never has been a period, in which the common law did not recognize Christianity as lying at its foundations.[31]

Acknowledgement of the formative role of Christianity upon American laws and institutions is entirely consistent with the Establishment Clause of the First Amendment. In 1853, when the constitutionality of the congressional chaplaincy was questioned, the Senate Judiciary Committee undertook an exhaustive study of the background and meaning of the Establishment Clause. The Committee concluded in part:

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[30] Joseph Story, *A Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law at Harvard University, on the Twenty-Fifth Day of August, 1829* (Boston: Hilliard, Gray, Little, and Wilkins, 1829), p. 4.

[31] Story, *Discourse*, pp. 20-21.

The clause speaks of "an establishment of religion." What is meant by that expression? *It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided.*

....

Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our

> armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.[32]

The same year the House Judiciary Committee conducted a similar study and came to the same conclusion.

> What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these.

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[32] Senate Judiciary Committee, S. Rep. No. 32-376, at 1, 4 (1853) (emphasis added).

....

At the adoption of the Constitution, we believe every State—certainly ten of the thirteen—provided as regularly for the support of the Church as for the support of the government: one, Virginia, had the system of tithes. Down to the Revolution, every colony did sustain religion in some form. It was deemed peculiarly proper that the religion of liberty should be upheld by a free people. Had the people, during the Revolution, had a suspicion of any attempt to war against Christianity, that Revolution would have been strangled in its cradle. At the time of the adoption of the Constitution and the amendments, the universal sentiment was that Christianity should be encouraged, not any one sect. Any attempt to level and discard all religion would have been viewed with universal indignation.

....

But we beg leave to rescue ourselves from the imputation of asserting that religion is not needed to the safety of civil society. It must be considered as the foundation on which the whole structure rests. Laws will not have permanence or power without the sanction of religious sentiment—without a firm belief that there is a Power above us that will reward our virtues and punish our vices. In this age

> there can be no substitute for Christianity; that, in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions. That was the religion of the founders of the republic, and they expected it to remain the religion of their descendents.[33]

In *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), this Court concluded that a law which prohibited a church from calling a pastor or priest from outside the United States violated the Free Exercise Clause, because it conflicted with Christianity. After explaining at great length the numerous legal and historical evidences of Christianity's influence upon American law, this Court concluded:

> If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find every where a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the

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[33] House Judiciary Committee, *Chaplains in Congress and in the Army and Navy*, H. R. Rep. No. 33-124, at 1, 6, 8-9 (1854).

> prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.

Id. at 471.

These statements by Sir William Blackstone, Chancellor Kent, the Senate and House Judiciary Committees, Justice Brewer, and others are entirely consistent with the Establishment Clause of the First Amendment. This does not mean they favored an official established church. Justice Brewer, the author of the *Holy Trinity* decision, understood that Christianity was not the official religion of the United States. In his 1905 book, *The United States a*

Christian Nation, he clarified:

> But in what sense can [the United States] be called a Christian nation? Not in the sense that Christianity is the established religion or the people are compelled in any manner to support it. ... Neither is it Christian in the sense that all its citizens are either in fact or in name Christians. On the contrary, all religions have free scope within its borders. Numbers of our people profess other religions, and many reject all. Nor is it Christian in the sense that a profession of Christianity is a condition of holding office or otherwise engaging in public service, or essential to recognition either politically or socially. In fact, the government as a legal organization is independent of all religions.
>
> Nevertheless, we constantly speak of this republic as a Christian nation—in fact, as the leading Christian nation of the world. The popular use of the term certainly has significance.[34]

III. The Fourth Circuit neglected the special significance of the cross for military personnel.

A. The Fourth Circuit's limited depiction of the crosses at Arlington National Cemetery is misleading.

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[34] David J. Brewer, *The United States a Christian Nation* 12 (1905).

The Fourth Circuit's appendix shows the cross as a small symbol on gravestones in Arlington National Cemetery.[35] Although most of the graves have a simple cross[36] carved into the headstone, the cemetery also contains much larger crosses. These include the Argonne Cross, erected "in memory of our men in France 1917-1918" (13 feet tall), the "Cross of Sacrifice" behind the Tomb of the Unknowns, the Canadian Cross of Sacrifice (24 feet tall), the Spanish-American War Nurses Monument (Maltese cross), and others.[37] The panel, perhaps uncomfortable with the idea that its opinion logically would require the removal of prominent crosses at the National Cemetery, struggles to avoid this conclusion. *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 211 & nn. 16 & 17 (4th Cir. 2017).

According to the official website of the American Battle Monuments Commission which created and maintains the overseas military cemeteries:

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[35] *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 211 n. 17 (4th Cir. 2017). *See* https://pbs.twimg.com/media/CUa2t63VEAEolfE.jpg to view the headstone images.

[36] These include Latin, Celtic, Aaronic, Armenian, Episcopal, Greek, Lutheran, Presbyterian, Russian Orthodox, Serbian Orthodox, United Methodist, Christian and Missionary Alliance crosses and others. U.S. Department of Veterans Affairs, National Cemetery Administration, *Available Emblems of Belief for Placement on Government Headstones and Markers*, https://goo.gl/akjTQJ.

[37] James Edward Peters, *Arlington National Cemetery: Shrine to America's Heroes* (2008).

> Each grave site for the World War I and World War II cemeteries is marked by a headstone of pristine white marble. Headstones of those of the Jewish faith are tapered marble shafts surmounted by a Star of David. Stylized marble Latin crosses mark all others.[38]

Although these cemeteries are located overseas, the land is given in perpetuity for the use of the United States Government and is operated by the American Battle Monuments Commission. Accordingly, the Establishment Clause is no less applicable to these cemeteries than to those within the United States.

Nor are crosses unique to American military cemeteries. To promote uniformity in British Commonwealth military cemeteries, the Imperial War Graves Commission (now the Commonwealth War Graves Commission) determined that all but the smallest cemetery would have one prominent cross, to be called the Cross of Sacrifice.[39]

On June 12, 1925 Canadian Prime Minister William Lyon Mackenzie King requested that a Cross of Sacrifice be erected at Arlington National Cemetery in Virginia to memorialize Americans who died in World War I while serving in the Canadian armed forces. President Calvin Coolidge approved the

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[38] American Battle Monuments Commission, *History*, https://www.abmc.gov/about-us/history.

[39] Jacqueline Hucker, *Monuments of the First and Second World Wars*, The Canadian Encyclopedia, https://goo.gl/Kmeg7P

request, and the Cross of Sacrifice was dedicated at Arlington on Armistice Day 1927.[40]

B. Military medals demonstrate that the cross is closely associated with the military.

Except for the Congressional Medal of Honor, the highest award a member of the U.S. Army can receive is the Distinguished Service Cross—a gold cross with an eagle on the front that is given "for extreme gallantry and risk of life in actual combat with an armed enemy force."[41] The Distinguished Service Cross is the equivalent of the United States Air Force Cross, the Navy Cross (for Navy and Marine personnel), and the Coast Guard Cross.[42] The cross emblem recognizes the willingness to risk one's lives to save the lives of others or to advance the military mission. This willingness to sacrifice is commonly set forth in the citation that accompanies the medal. The cross, a fitting symbol of such heroism and self-sacrifice, is used by other selfless organizations like the International Committee of the Red Cross[43] and many local fire departments[44].

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[40] Canadian Cross of Sacrifice - Arlington, VA, Waymarking.com, https://goo.gl/grVbzF

[41] *Distinguished Service Cross Law and Legal Definition*, USLegal.com, https://goo.gl/awjWby

[42] U.S. Dep't of Defense, *Awards for Military Valor*, https://goo.gl/1R5Nh7. A member of the Coast Guard may receive the Navy Cross when operating under Navy command. For the Coast Guard Cross, *see* 14 U.S.C. § 491a.

[43] *Red Cross Logo*, Logodesignlove.com, https://goo.gl/FtsJbP

[44] *A Piece of Fire Service History: The Maltese cross*, Fireengineering.com, https://goo.gl/xm7ojw

The military medals of other countries also display a cross. The British Commonwealth nations award the Victoria Cross[45] and the George Cross.[46] Germany awards the Bundeswehr Cross of Honor for Valor for "[a]n act of gallantry in the face of exceptional danger to life and limb while demonstrating staying power and serenity in order to fulfill the military mission in an ethically sound way."[47] Military medals in Russia were frequently in the shape of crosses (the St. Catherine Medal, the St. Alexander Nevsky medal, the St. George Medal, the St. Vladimir Medal, and others).[48] Cross-shaped medals were eliminated and suppressed by the Communist regime after 1918, but since 1991 the Russian Federation has resumed issuing cross-shaped medals to its military heroes.[49]

France awards its bravest soldiers the Croix de Guerre (Cross of War),[50] Sweden the Grand Cross of the Order of the Sword,[51] Norway the King Haakon VII Freedom Cross (aka Cross of Liberty),[52] and Poland the Order of the Military Cross and the Cross

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[45] *The History of the Victoria Cross*, Historic-UK.com, https://goo.gl/jhy62k

[46] *George Cross*, Britannica.com, https://goo.gl/bkXvjA

[47] *Bundeswehr-Cross-of-Honour-for-Valour*, Revolvy.com, https://goo.gl/gwLF6A

[48] Robert Werlich, *Russian Orders, Decorations and Medals* (1981), depicted at CollectRussia.com, https://goo.gl/4cbDcS

[49] *The Russian Federation: Order of St George*, Medals.org.uk, https://goo.gl/TfvXKY

[50] *Croix de Guerre*, Britannica.com, https://goo.gl/UtJQNp

[51] *Sweden: Knight of the Grand Cross of the Order of the Sword*, Medals.org.uk, https://goo.gl/mZu4TX

[52] *Kingdom of Norway: King Haakon VII's Cross of Liberty*, Medals.org.uk https://goo.gl/K1YYPK

of Merit with Swords (Gold, Silver, and Bronze).[53] Other military forces throughout the Western world award similar cross-shaped medals.

The reason is self-evident. As General Douglas MacArthur said in his Farewell Address at West Point: "The soldier, above all other men, is required to practice the greatest act of religious training—sacrifice."[54] The military cross appropriately recognizes that the sacrifice of the soldier for others on the battlefield is in some sense a reflection of the sacrifice of Jesus for others on the cross.

IV. The National Mall is based on a grid of a Latin cross.

Based primarily on the 1791 design of Major Pierre Charles L'Enfant that was approved by President Washington, the National Mall is built in the shape of a Latin cross. A 1902 Senate Park Commission Report stated:

> Regarding the [Washington] Monument as the center, the Capitol as the base, and the White House as the extremity of one arm of a Latin cross, we have at the head of the composition on the banks of the Potomac a memorial site of the

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[53] The President of Poland, *Orders and decorations*, https://goo.gl/PexPBk

[54] General Douglas MacArthur, *Farewell Address: Duty, Honor, Country*, United States Military Academy, West Point, New York (May 12, 1962), https://goo.gl/MC3Nw6; *cf. John* 15:13, "Greater love hath no man than this, that he lay down his life for his friends."

> greatest possible dignity, with a second and only less commanding site at the extremity of the second arm.[55]

If Congress can expressly reference the Latin cross as the basis for the plan for the National Mall, the City of Bladensburg can erect a Latin cross as a memorial to American veterans. Or must we now plow under the National Mall?

V. In *City of Pensacola v. Kondrat'yev*, a case currently before this Court, the lower court judges said they were bound by Eleventh Circuit precedent but urged this Court to overturn that precedent.

The Pensacola case involves the "Bayview Cross" erected at the beginning of World War II in a city park for community events such as sunrise, Veterans' Day, and Memorial Day services. Federal District Court Judge Vinson, in his 2017 opinion, said "the historical record indicates that the founding Fathers did not intend for the Establishment Clause to ban crosses and religious symbols from public property" *Kondrat'yev v. City of Pensacola*, No. 3:16-cv-00195 (N.D. Fla. 2017), slip op. at 6, and that they "would have most likely found this lawsuit absurd. And if I were deciding this case on a blank slate, I would agree and grant the plaintiffs no relief." *Id.* at 6. However, he said, he is bound by *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) and must therefore rule the

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[55] U.S. Senate Committee on the District of Columbia, Senate Rep. No. 166, 57th Congress, 1st Session (1902), at 2.

display unconstitutional. After a lengthy critique of current Establishment Clause jurisprudence, he therefore concluded, "Count me among those who hope the Supreme Court will one day revisit and reconsider its Establishment Clause jurisprudence, but my duty is to enforce the law as it now stands." *Id.* at 22.

The Eleventh Circuit affirmed based upon *Rabun* but was equally critical of the *Rabun* opinion. The Per Curiam Opinion of the panel says in its opening paragraph, "Having concluded that we are bound by existing Circuit precedent, we find ourselves constrained to affirm." *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1171 (11th Cir. 2018) (per curiam). Repeatedly, the Per Curiam Opinion uses the term "constrained" or "bound," and concludes by saying "our hands are tied." *See id.* at 1172, 1174.

In his opinion concurring in the judgment, Judge Newsom begins by saying, "Reluctantly, I agree that our existing precedent -- and in particular, *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) -- requires us to affirm the district court's decision...." *Id.* at 1174 (Newsom, J., concurring in judgment). Concerning *Rabun*, he says, "under our prior-panel-precedent rule, it seems clear enough to me that we -- by which I mean the three of us -- are stuck with it." *Id.* But he adds, "Having said that, it's equally clear to me that *Rabun* is wrong." *Id.* at 1175. The remainder of his opinion reads like a dissent, although of course he feels bound to concur in the result. He says, "It's hard to imagine an Establishment Clause analysis more

squarely at odds with *Rabun*'s than the one that Justice Kennedy inaugurated in *Allegheny* and then cemented in *Greece*." *Id.* at 1179.

Likewise Judge Royal, concurring in the judgment, opens by saying, "Good law -- *stare decisis* -- sometimes leads good judges to follow bad law and write the wrong order. That happened in this case." He calls *Rabun* "a case that was wrongly decided, and even if it was not wrongly decided in 1983, it has been eclipsed by recent Supreme Court cases...." *Id.* at 1182-83 (Royal, J., concurring in judgment).

The Foundation has never seen a case in which judges have so severely criticized a precedent they felt compelled to follow and in which they so clearly call for appellate review. The Foundation hopes this Court will use both *Bladensburg* and *Pensacola* to clarify its Establishment Clause jurisprudence and bring it back in accord with the actual language of the First Amendment and the intent of its Framers.

VI. The Court should respect the memory of deceased veterans and the rights and sensibilities of their families and descendants.

The Fourth Circuit ignored all of the evidence cited above and simply held that the cross is exclusively a Christian symbol and the Latin cross is the preeminent symbol of Christianity. *See Am.*

Humanist Ass'n, 874 F.3d at 206-07 (citations omitted).[56]

Utterly missing from the Fourth Circuit's analysis, however, is consideration for the memory of the deceased veterans and the rights and sensibilities of their families and descendants.

A memorial monument, whether a private gravestone or a public memorial, is a work of art protected by the Free Speech Clause and in some instances by the Free Exercise Clause of the First Amendment. Many persons, planning for death, invest careful thought, effort, and expense to design a headstone for themselves or their loved ones. Those plans may include the precise words to be engraved, the type of stone including its shape and dimensions, and the artwork to appear on the stone such as crosses, angels, or floral designs. Many, for religious or other reasons, wish to have a cross on their

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[56] These statements are factually incorrect. Christians at various times and places have used many forms of the cross, including the Celtic cross, the Maltese cross, the Jerusalem cross, the St. Andrews cross, the Crucifix, and many others. *See Cross: religious symbol*, https://www.britannica.com/topic/cross-religious-symbol. Christians are not in agreement as to the shape of the cross upon which Jesus died; 7 Gerhard Kittel, *Theological Dictionary of the New Testament* 572 ("Stauros") (1971).

The Fourth Circuit's flawed reasoning coupled with factual errors leads to the absurd conclusion that if the Bladensburg Cross is replaced with a Celtic cross of similar size, the Establishment Clause problem would be averted. As Justice Rehnquist famously observed: "[N]o amount of repetition of historical errors in judicial opinions can make the errors true." *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

gravestones or memorials. They would consider removal of that cross to be nothing less than grave desecration.

The Court should respect the memory of those for whom this monument was dedicated over 90 years ago as well as the rights and sensibilities of those who planned it, contributed to support it, and dedicated it to their loved ones. Such consideration is utterly absent from the Fourth Circuit's analysis. As this Court has recognized, "[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion).

CONCLUSION

Ironically, the cross, which has inspired Americans since the planting of the Jamestown Cross in 1607,[57] is now the most censored symbol in America.

This Court should reverse the Fourth Circuit and protect the Bladensburg Cross as an exemplar of America's Christian heritage and a memorial to the Prince George's County soldiers who died in World War I.

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[57] George Percy, *Jamestown: 1607, The First Months*, Nationalhumanitiescenter.org, https://goo.gl/xXbnC7

Respectfully submitted,

JOHN EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

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